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No. 85-920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATUTES:

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.*

Section 43, 49 U.S.C. App. § 1552 ..... *passim*

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This brief *amicus curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 96 national and international unions with a total membership of approximately 13,000,000 working men and women. AFL-CIO unions and the members of those unions will be directly affected by the result reached in this case. In addition, the AFL-CIO has a more general interest in the

standards that are applied to resolve questions of severability when a portion of a statute is invalid.

SUMMARY OF ARGUMENT

The question in this case is not whether the statute is severable, but rather at what point the statute should be severed. Petitioners argue for excision from the Airline Deregulation Act of 1978 of the whole of the Act's employee protection provisions. Respondents, on the other hand, support the position of the court of appeals that only the part of the Act providing for the unconstitutional legislative veto should be severed.

We show in this brief that it is not the court below but petitioners who offer a result that is unfaithful to the will of Congress. Like much legislation involving matters of economic regulation, the ADA is in significant part the product of negotiation and compromise among legislators holding different views and priorities and among contending interest groups. The legislative process that culminated in the passage of the ADA involved intense lobbying by, among others, the following constituencies: consumers, the airline industry, smaller communities, regions of the country, and unions representing employees in the industry. Each of these constituencies asserted a different set of interests with respect to the subjects of the legislation. The enacting consensus ultimately formed in Congress was the result of compromises and trade-offs made among legislators who placed vastly different values on these diverse interests.

The enactment of the employee protection provisions of the ADA must be understood as the product of this process. What petitioners seek in this case is to alter the bargain that was the basis for the legislation. By depriving protected employees of the "first right of hire," petitioners would be freed of an obligation Congress placed upon them as a condition of deregulation and would thus achieve for themselves a better deal than that which is

embodied in the congressional enactment. Protected employees, on the other hand, would be deprived of their part of the legislative bargain.

Where the terms of legislation are a function of compromise between diverse interest groups, invalid statutory provisions should not be severed from the rest of a statute if to do so would alter the legislative bargain that was reached. The result petitioners urge would alter the legislative bargain embodied in the ADA. The result reached by the court below is, on the other hand, faithful to that bargain.

ARGUMENT

1. The question posed by petitioners is not *whether* the unconstitutional legislative veto provision of the Airline Deregulation Act of 1978 (hereinafter "ADA" or "the Act") should be severed from that Act. Indeed, no party to this case is contending that the statute at issue here is *not* severable. The petitioner airlines differ from the court of appeals as to *the point at which the severance should take place.* The airlines contend that the entirety of § 43 of ADA—which contains the whole of the employee protective provisions of the Act—should be severed. The court of appeals determined that only the portion of § 43 that provides for the unconstitutional legislative veto is to be severed. In practical terms, what hangs in the balance is whether the "first right of hire" that Congress provided in § 43(d) of the Act to a statutorily defined class of protected employees should be invalidated.[1]

It is our submission that the very principles underpinning the legislature's primacy in the development of statutory law that petitioners recite at length in their

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[1] The "monthly assistance payments" portion of § 43 has never been implemented. That part of the Act is expressly made "subject to such amounts as are provided in appropriations acts. . . ." § 43(a)(1). Congress has never appropriated any money to fund this program.

brief—principles with which we agree—preclude the result that petitioners urge in this case. For it is not the court below but petitioners who offer a result that would fail to effectuate the will of Congress as embodied in the ADA.

The respondents in this case have persuasively documented: that Congress directly created with considerable specificity a "first right of hire" for a class of protected employees; that by virtue of § 43(d) that right exists unconditionally without the need for any subsequent action by the Secretary of Labor; that any regulations the Secretary might choose to issue to implement the "first right of hire" must be within the quite specific parameters of that right spelled out by Congress in the Act; and that the reasons for inclusion of the one-house veto provision in the Act had to do with a distinct employee benefit provision (which has since effectively become moot)—the monthly assistance payments provision—which is not self-implementing but requires action by, *inter alia*, the Secretary before it would become effective. We do not intend here to rehash the submissions of the respondents on these points. Suffice it to say in this regard that respondents have shown that severing the unconstitutional veto provision from the bill—or severing that provision together with the monthly payments provision—would not infringe Congress' legislative prerogatives nor alter the careful balances that Congress struck in enacting the ADA.

While it is unnecessary to go further, we believe it is useful to explore the implications of severing the statute at the point urged by petitioners—*viz.*, removing the entire employee protection provision from the ADA. Such an inquiry serves to focus the factors that should guide resolution of questions of severability. In contrast to the point of severance chosen by the court below, severing the statute at the point urged by petitioners *would* alter a balance struck by Congress and constitute a judicial trespass in the legislative province.

2. Like much legislation involving matters of economic regulation, the ADA is in significant part the product of negotiation and compromise among legislators holding different views and priorities and among contending interest groups. This Court has taken note of this phenomenon in the contexts of labor and environmental legislation. See, e.g., *Furniture Moving Drivers v. Crowley*, 467 U.S. 526, 542 (1984) ("Like much federal labor legislation, the statute was 'the product of conflict and compromise between strongly held and opposed views. . . .'"); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 847 (1984) ("As always in this area, the legislative struggle was basically between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes would retard industrial development with attendant social costs."). See also Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 Harv. L. Rev. 4, 17, 46 (1984); Choper, *Judicial Review and the National Political Process* 9 (1980).

The legislative process that culminated in the passage of the ADA had the potential directly and immediately to affect the lives and fortunes of consumers, the airline industry, smaller communities, regions of the country and employees in the industry. That process therefore engaged the intense lobbying efforts of all of those constituencies, each expressing a different view on the extent to which airlines should be deregulated and, passing that, on the myriad ways in which deregulation should be accomplished. The enacting consensus ultimately formed in Congress was the result of compromises and trade-offs made among legislators who placed vastly different values on these diverse interests.

As is generally the case with major economic legislation, those compromises reflected a calculus of the public interest, of politics, and of publicity and persuasion.

The series of initiatives and responses, agreements and disagreements that produced the final bill were shaped also by the rules, procedures and understandings that Congress has formulated to serve its 535 members' needs, and to allocate power between those who seek immediate legislative action and those who desire more deliberation or seek to preserve the status quo. And, of course, the participants in this legislative debate were all acutely conscious of the fact that Congress has much to do and little time in a session in which to do it, that time and tide wait for no man and no legislative measure, and that delay is therefore often a weapon for the weak and that compromise with these delaying forces is often a weapon for the strong. It is this complex of forces generated by the legislative system as it works in the Congress of the United States that determines which bills are introduced, which are seriously pursued, which survive scrutiny in committee hearings and mark-ups, which are scheduled for floor action and, for those few bills that make it through these tests, what is subtracted that the original proponents desired and what is added that the original opponents desired in order to achieve an enacting consensus.

The ADA's legislative path is well described in the following excerpt from a floor speech by Senator Goldwater:

> The distinguished Senator from Nevada (MR. CANNON), and now the committee's chairman, deserves great credit for having tried to achieve a consensus on this highly complex legislation. That total agreement proved impossible is no reflection on him, but rather it is a result of having to reconcile many conflicting claims, some of which are:
>
> First. Consumer desires for lower air fares during a period of escalating costs, especially fuel.
>
> Second. Varying financial conditions of the airlines and their ability to compete in a more open marketplace.

> Third. Regional differences affecting access to the national air transportation system.
>
> Fourth. Workers in the industry fearing a shakeout and a loss of jobs.
>
> Fifth. Reluctance on the part of long-term lenders to provide capital during a period of financial uncertainty in the industry.
>
> Sixth. Fears by smaller communities that the airlines will compete on the longhaul, dense routes and therefore, they will lose service.
>
> These are some of the concerns that came into play during the markup of S.2493.
>
> It took a recordbreaking 20 markup sessions to produce a bill. I submit that is a pretty good indicator of the amount of disagreement or doubt on the part of the committee members. [124 Cong. Rec. 10,663-64 (1978)].

The enactment of § 43 must be understood as the product of this process. In the tug and haul of the process, Congress determined that covered airlines seeking deregulation would have this price to pay: a protected class of employees would have the "first right of hire" if those employees should lose their jobs for reasons other than cause during the ten year period immediately following enactment of the ADA. Payment of this price was part and parcel of the concensus that enacted the bill. Thus, when Senator Hatch proposed an amendment to remove altogether the employee protective provisions from the bill, Senator Kennedy responded:

> Mr. President, I hope the amendment of the Senator from Utah will be defeated. In this legislation, we are effectively guaranteeing service to small communities in this Nation for a period of 10 years. We are maintaining certain basic protections for the airlines and their shareholders for a period in the future. Airlines are even permitted to protect certain selected routes from automatic entry despite the anticompetitive effect of such protection for airlines. We are writing in guarantees for just about every aspect

> of the airline industry. That happens to be the fact of the matter.
>
> We also have a limited employee protection policy written into this legislation. That is only fair; but the amendment of the Senator from Utah would strike it out. I say we are protecting the stockholders, we are protecting the communities, and we are protecting the airlines with this legislation. The effect of the amendment of the Senator from Utah would be to say, "It is OK to protect all of those people, but we should wipe out and eliminate what limited protections there are for the employees." I say that would be unfair and unwarranted. [124 Cong. Rec. 10,682 (1978)].

Senator Hatch's amendment was defeated by a vote of 85 to 7. *Id.*

Similarly, when Representative Anderson, the ADA's floor manager in the House of Representatives, urged adoption by the House of the conference report on the bill, he was careful to state the provisions providing for employee protection and to give his colleagues the following assurance:

> The House provisions on employee protection and mutual aid were stronger than those in the conference bill. However, the conference provisions are considerably stronger than the Senate bill, particularly with respect to the mutual aid pact, regarding which the Senate proposed no change in existing law. I believe that the conference report goes a long way toward the House proposals and that the conference provisions represent substantial progress for the airline employees. [124 Cong. Rec. 38,522 (1978)].

What petitioner airlines seek in this case is to "alter the balance that Congress had in mind in drafting" the ADA. *Bowsher v. Synar*, 54 USLW 5064, 5070 (U.S. July 7, 1986). By depriving protected employees of the "first right of hire" the airlines would be freed of an obligation Congress placed upon them as a condition of deregulation and would in that way achieve for themselves

a better bargain than that which they obtained in the legislative process. Protected employees, on the other hand, would be deprived of their part of the legislative bargain.

Such a result negates, rather than effectuates, the congressional will. The point is well-made by Professor Easterbrook:

> If legislation grows out of compromises among special interests . . . a court cannot add enforcement to get more of what Congress wanted. What Congress wanted was the compromise, not the objectives of the contending interests. . . . [The statute] is designed to do what it does in fact. The stopping points are as important as the other provisions. If the statute gave Group X twenty-five percent of what it wanted, it probably meant contending groups to keep the rest. A court cannot observe that the statute gives Group X more than it had before and then keep moving in the same direction. The compromise was that Group X would get some benefits but not more. When a court observes that Congress propelled Group X part way to its desired end, it cannot assist Group X farther along the journey without undoing the structure of the deal. [98 Harv. L. Rev. at 46].[2]

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[2] *Cf. Illinois Commerce Com'n v. I.C.C.*, 749 F.2d 875, 892-893 (D.C. Cir. 1984) (Scalia, J., dissenting), *cert. denied*, 106 S. Ct. 70 (1985):

> It is my impression that, in the long era of expanding economic regulation that preceded the current trend towards disengagement, zealous regulators more than once turned a legislative compromise into an unqualified victory by successfully urging that the limiting text of a statute be interpreted in light of its "broad remedial purposes"—as though there had been only one side in the Congress, or as though prescribed limitations were less important than the prescrjbed powers which they circumscribed.
>
> * * * *
>
> Legislative compromise (which is to say most intelligent legislation) becomes impossible when there is no assurance that the statutory words in which it is contained will be honored.

The "first right of hire" established and defined in § 43(d) is an integral part of the legislative bargain embodied in the ADA. That legislated right, which is not constitutionally infirm, should not be taken away in the judicial process.

3. Petitioners suggest that all this is not of much moment because, after this Court strikes down § 43, "[i]f Congress wishes to reinstate a statute, it can do so." Pet. Br. at 18. This suggestion does not seem to support an argument for striking down all, rather than only a part, of § 43 or indeed for any particular result; it is equally true that if Congress is not satisfied with a result that preserves the valid parts of § 43, Congress can repeal the provision. More important, this suggestion is cynical in the extreme because it studiously ignores the realities of the legislative process. As we have discussed, § 43 was part of an overall legislative bargain that was arrived at by a transcient coalition of diverse interests. And, Congress did not happen to deal with the question of airline deregulation by random chance. That issue was pushed to the top of Congress' agenda over a thousand competing and worthy public concerns by a unique set of pressures. As the result of the ADA's passage, the other members of the coalition that made passage of the ADA occur have secured their parts of the legislative bargain. They have no interest in now joining with the employee representatives to reinstate the protected employees' part of the package. Thus, while there is no question that the Congress that enacted the ADA meant to establish a "first right of hire" for protected employees, there is no guarantee that the congressional coalition that enacted ADA could now be reconstructed to reenact the "first right of hire" by itself; indeed such a reenactment is wholly improbable.

4. The classic formulation of the standard of severability stated in *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932), makes clear that the issue is one of legislative intent:

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

As with other questions of legislative intent care must be taken to understand the values and interests that are embodied in the enactment. Where the terms of legislation are a function of compromise among diverse interest groups and one provision is invalid, the judicial task in determining whether the statute is severable, and if so what is the proper point of severance, is to ensure that nothing is done to upset the legislative bargain. To be sure, by definition any severance works some change in the balance struck in the enactment. But there are cases where a point of severance may be found that is faithful to the essence of the legislative bargain. In this case, the court of appeals found that point. On the other hand, the result petitioners urge would alter the legislative bargain embodied in the ADA.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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